Filed 2/26/09 In re E.M. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re E.M. et al., Persons Coming Under the Juvenile Court Law.	B205377 (Los Angeles County Super. Ct. No. CK70987)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.C., Defendant and Appellant; E.M. et al., Appellants.	

APPEALS from an order of the Superior Court for the County of Los Angeles. Elizabeth Kim, Referee. Affirmed.

Leslie A. Barry, under appointment by the Court of Appeal, for Defendant and Appellant.

Darlene Azevedo Kelly, under appointment by the Court of Appeal, for Appellants.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Timothy M. O'Crowley, Senior Deputy County Counsel, for Plaintiff and Respondent.

SUMMARY

Mother M.C.'s daughter, E., was found to have been sexually abused by her stepfather, S.C.G., who lived with mother and her three children, E., E.M., and B. The three children were detained by the Department of Children and Family Services (Department), and were released to the mother on the condition that S.C.G. would not live in the home. At the jurisdictional and dispositional hearing some seven weeks later, the juvenile court sustained the allegations of sexual abuse and also found the mother knew or should have known of the ongoing abuse and failed to take action to protect the child.

The mother appeals, contending there was no evidence to support the court's finding she knew or should have known of the sexual abuse, and she should have been identified as a non-offending parent. Two of the children – E. and B. – also appeal, contending there was insufficient evidence to support the finding that the mother failed to protect the children, and therefore insufficient evidence of risk to the children to sustain dependency jurisdiction.

We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

S.C.G. and the mother lived together with the mother's three children, E., E.M., and B., who were four, eight, and less than two years old, respectively, when they were detained. B. was S.C.G.'s biological child; E. and E.M. were the children of a different

father, R.M. On December 6, 2007, the police responded to a neighbor's report indicating E. was being sexually abused by S.C.G.[1]

The police report, attached to the Department's detention report, described interviews with the mother, E., E.M., and S.C.G.:

- The mother told police she was not aware of the sexual abuse that was taking place, and that E. had never mentioned to her that S.C.G. touched her on her vagina. She told the police that E. had been telling her for

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[1] The Department's petition alleged the children came within the jurisdiction of the juvenile court under subdivisions (b), (d), and (j) of Welfare and Institutions Code section 300. (All further statutory references are to the Welfare and Institutions Code.) Those provisions allow the court to find a child to be a dependent child of the court if:

- "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . ." (§ 300, subd. (b).)

- "The child has been sexually abused, or there is a substantial risk that the child will be sexually abused, . . . by his or her parent or . . . a member of his or her household, or the parent . . . has failed to adequately protect the child from sexual abuse when the parent . . . knew or reasonably should have known that the child was in danger of sexual abuse." (§ 300, subd. (d).)

- "The child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions. . . . " (§ 300, subd. (j).)

As subsequently modified by the juvenile court, the Department's petition stated that "[o]n numerous prior occasions, the [children's mother's] male companion [S.C.G.], father of the child [B.] sexually abuse[d] the child [E.] since the child was three years old by repeatedly fondling and digitally penetrating the child's vagina causing the child severe pain and irritation. Further, the child's mother knew or should have known of the ongoing sexual abuse of the child by [S.C.G.] and failed to take action to protect the child. Such sexual abuse of the child [E.] on the part of [S.C.G.] and the mother's failure to protect the child endangers the child's physical and emotional health, safety and well-being, creates a detrimental home environment and places the child and the child's siblings [E.M. and B.] at risk of physical and emotional harm, damage, danger, sexual abuse and failure to protect."

approximately one year that her vagina burned when she urinated. The mother said that E. "would tell her that her seven year old brother [E.M.] would touch her vagina and cause it to be red/irritated." The mother told police she had counseled E.M. and advised him it was not right for him to be touching E. in the vaginal area. The mother said that she and S.C.G. had inspected E.'s vaginal area on a regular basis and only noticed minor redness. The mother believed that when E. urinated in her underwear, it caused her vaginal area to get red and irritable; she did not believe E.M. had been touching E., and thought E. was making up the story. The mother told police that S.C.G. was normally alone with the children for approximately one hour in the morning until the babysitter arrived, and the babysitter never mentioned anything concerning behavioral changes with E.

- E.M. told police that S.C.G. would tuck them (E.M. and E., who shared a bedroom) into bed every night, and E. would tell S.C.G. that her vagina was hurting. "This was a daily occurrence and in response to [E.'s] statement, [S.C.G.] would visually check [E.'s] vagina to see if it there was any redness or irritation." E.M. never saw S.C.G. touch E. inappropriately or near her vagina. E.M. said he often saw E. scratching her vaginal area. E.M. said that, about a year ago, E. "had been accusing him of touching her vagina and the cause of her irritation and redness to her vagina," and said his mother would counsel him and tell him not to touch his sister.
- E. told police that S.C.G. "enters her bedroom when she is asleep and touches her vagina." She said S.C.G. would roll her on her back, open her legs and remove her pants; he would use his right index finger on her vagina and move it side to side, in a rapid motion. E. said S.C.G. also inserted his right index finger into her vagina on several occasions, causing her discomfort and pain.

- S.C.G. told police he had never touched E. inappropriately. He said that when E. spent the weekend with her biological father (R.M.), she would return home and tell them that her vagina hurt. S.C.G. said he and the mother would check E's vagina and would not notice any redness or bleeding; they found urine stains on her underwear and believed the redness/rash was caused by the wet underwear, not by sexual assault. S.C.G. told police he recalled applying cream/ointment on E.'s vagina a few weeks earlier, and said the mother often applies cream on E; he did so on the one occasion because the mother was not available and he wanted to help the redness/rash go away.

S.C.G. was arrested, and the mother and E. were taken to a clinic, where they were interviewed by the Department's social worker and where E. had a medical examination. (The examination was normal, with no damage to the interior portion of E.'s vagina that was consistent with sexual abuse.) The mother reported she was unaware S.C.G. was touching her daughter inappropriately, and would make sure it would never happen again. She told the social worker she recalled one incident, about six months earlier, when E. had redness on the external area of her vagina. E. told her that her brother, E.M., had touched her in that area. The mother had talked to E.M. about it; E.M. was very upset, began crying, and stated he did not touch his sister. The mother was asked if she left the children alone with S.C.G., and reported she did so only when she goes to the store for no more than an hour. The mother stated that as a result of the abuse allegations, she was no longer interested in a relationship with S.C.G.

The social worker also interviewed E., whose statements were consistent with those she made to the police: Her stepfather touched her between her legs with his index fingers with a circular motion, both inside and outside her vaginal area. E. said S.C.G. pulled off her panties but not her upper clothing. This occurred multiple times; E. said her stepfather told her not to tell anyone, so she did not, until recently when she told a neighbor. E. made similar statements to the nurse practitioner who examined her; the

nurse practitioner also reported E. said S.C.G. "did this when she is alone with him and her mother is at the store," and that E. said she was afraid of S.C.G. The social worker also interviewed E.M., who said he did not notice any unusual behavior with his sister or his stepfather. He reported he was accused about six months ago by E. of touching her inappropriately, but that it wasn't true.

On December 11, 2007, the juvenile court detained the children, and released them to the mother on the condition S.C.G. did not reside in the home.[2] The case against S.C.G. was filed with the district attorney's office, but was rejected; S.C.G. was released from jail and was not charged with any criminal acts.

In late December 2007 and early January 2008, the Department conducted further interviews of E., E.M., the mother, and S.C.G., as follows:

- E.'s description of the abuse remained the same. When asked if she had told her mother, she said, "No, I forgot to tell her because I was afraid he was going to hit me."
- E.M. stated:

> "My sister said he [S.C.G.] touched her and one time I saw him touch her but I was crying because I had a headache and I didn't go to school. My mom was at work and we were home with [S.C.G.] He told me not to cry because he was only checking my sister's private parts because she was saying it hurt and she was touching herself. They were in my mom's bedroom and I was in the living room but then I went to the bedroom door. My sister just said he touched her

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[2] S.C.G. was ordered to have no contact with E. and E.M., and monitored contact with his child, B., at a Department office. R.M., the father of E. and E.M., was allowed unmonitored visits, including weekend and overnight visits. (When R.M. was interviewed, he told the Department that he had a good relationship with the mother; had visits with his children on a regular basis; and had no knowledge or suspicions of E. being sexually abused. R.M. said he was aware that E. complained about pain and irritation in her vaginal area, but she never disclosed to him that someone was touching her inappropriately.)

but he really didn't. My sister would touch herself and she would make her private part hurt."[3]

- The mother reported that these events "came as a big surprise to me. I blamed myself because I truly never saw anything. I kept asking myself why I never knew and how I could not have seen the signs. But my daughter never said anything to me and I really never saw anything abnormal with [S.C.G.] and the kids." The mother said that, now that S.C.G. was out of jail, he explained to her that the babysitter probably had something to do with it; when E. had a rash on her vagina just after Thanksgiving, S.C.G. applied ointment, and the babysitter told him he shouldn't do so because he was not her father. S.C.G. told mother that he refused advances by the babysitter, who sought revenge by coaching E. to say all this. Mother concluded: "I cannot say what he is telling me is true because the only person I stand behind 100% is my daughter. I believe her over anybody and I will fight for my kinds before anybody else."[4] Mother also said S.C.G. "will never step foot in my house again or even have access to my children. I don't even want to have a relationship with him ever again."

The report stated that, "[a]lthough the mother expresses she will do anything to protect her children and maintain their safety, she appears to be ambivalent about the facts of this case," and "at times appears to believe her male companion's version of the story . . . ."[5]

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[3] E.M. again recounted the incident when E. told the mother that E.M. had touched her, but said that it was not true: "I never touched her and she was just lying to my mom about that. My mom believed me but my sister would always touch herself on her private parts and she would make it hurt."

[4] S.C.G.'s interview consisted principally of an elaboration on the babysitter-revenge scenario.

[5] The Department's report noted that S.C.G. and the mother own a business; mother stated they own a sewing business, which S.C.G. runs while the mother works for another company.

A contested jurisdictional and dispositional hearing was held on January 29, 2008, at which E., the mother, and S.C.G. testified. When asked if S.C.G. ever touched her in a way she thought was not right, E. testified that S.C.G. put cream on her; she did not remember if this happened more than once, but also said it happened only one time. S.C.G. testified that the mother checked every day on the vaginal rash E. had the previous summer, but he did so on only one occasion, and never checked her underwear for any reason. The mother testified she had no reason to believe S.C.G. was doing anything inappropriate with E. until the police told her that E. had reported the touching to a neighbor. She said she was not still romantically involved with S.C.G.; when asked if it was her intention to become involved in a relationship with him, she answered, "Not at this time." When asked when she first noticed E.'s rash, she said she thought it was four or five months ago, around late summer of 2007. She said the rash wasn't very severe, lasted a couple of days, and did not return until around the Thanksgiving weekend, when E. returned from a visit to her father. Again the rash was not severe, and lasted two or three days. The mother also testified that the incident in which E. told her that E.M. had touched her was approximately two years ago.

At the conclusion of the testimony, counsel for minors E. and B. argued the Department did not meet its burden to show that the mother should have known of the abuse, and that the allegations against her of failure to protect the children should be stricken from the petition. Counsel for E.M. agreed. The court then observed:

> "[B]ut we also have your client [E.M.] who made statements to the police that [S.C.G.] regularly checks [E.] at night and looks at the child's vaginal area. I'm wondering why is it that [E.M.], who is eight, knows that when [S.C.G.] has been in the home for about two years and why hasn't the mother known."

The court asked counsel for the mother to address what the mother should have known, and when counsel referred to the mother's testimony that the rashes coincided with visits to the father, the court stated:

> "The Court: Mr. Lee, they're alleging digital penetration for a period of two years on a four-year-old child.
>
> "Mr. Lee: Yes, Your Honor.
>
> "The Court: You don't think that this is something that the mother should have known about?"
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> "Mr. Lee: If there was some reason to believe there was indications that would have shown her that something like that was going on, then she could have taken action to find out about it. I think, yes, that would have been true. I don't think there's any indication those factors are there. Just because something is happening, if there's no indication any of that information getting to the mom, then there's not enough evidence to show she should have known."

The court sustained the Department's petition, including the allegations that the mother knew or should have known of the ongoing sexual abuse by S.C.G. and failed to take action to protect the child.[6] The court stated it understood counsel's position, but:

> "[T]here was irritation and there was a complaining victim and other members in the family were aware that [S.C.G.] did have access to this child for more than what he has admitted to."

Both the mother and minors E. and B. filed timely appeals.

DISCUSSION

Our review of the mother's and children's contentions that insufficient evidence supported the juvenile court's finding is governed by well-established principles. We determine if there is any substantial evidence – evidence which is reasonable, credible, and of solid value – to support the conclusion. (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393.) In making this assessment, we resolve all conflicts in the

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[6] The Department's original allegations were that the mother knew of the ongoing sexual abuse; the court modified the allegations to say that the mother knew or should have known of the abuse.

evidence, or in reasonable inferences from the evidence, in favor of the prevailing party – here, the Department. (*Ibid.*) Issues of fact and credibility are questions for the trier of fact, and the trial court's determination will not be disturbed unless it exceeds the bounds of reason. (*Ibid.*) But substantial evidence is not the same as any evidence; a decision supported by a "mere scintilla" of evidence need not be affirmed on appeal. (*Ibid.*) Substantial evidence may consist of inferences, but the inferences must be a product of logic and reason and must rest on the evidence; inferences cannot be the result of speculation or conjecture. (*Id.* at pp. 1393-1394.) "'The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.' [Citation.]" (*Id.* at p. 1394.)

A. The mother's appeal.

The mother acknowledges E. was sexually abused by her stepfather and therefore subject to juvenile court jurisdiction, and that E.'s siblings, E.M. and B., are also subject to juvenile court jurisdiction because E. was sexually abused. Her only contention is that the allegations against her should have been stricken from the petition; she argues there was no evidence to support the finding that she knew or should have known about the abuse, because E. never told her and mother "never observed anything that [led] her to infer that sexual abuse was occurring." The question, however, is whether she observed anything that *should have* led her to suspect that sexual abuse was occurring. While the question is a close one, our review is limited. "'[I]n light of the whole record,'" and given that we necessarily defer to the juvenile court on fact and credibility issues, we certainly cannot say the juvenile court's finding "'exceed[ed] the bounds of reason.'" (*In re Savannah M., supra*, 131 Cal.App.4th at pp. 1394, 1393.) The court could reasonably infer mother should have known that abuse was occurring from the following evidence:

- Mother told the police that E. had been telling her for approximately one year that her vagina burned when she urinated. (At trial, she said it was "not a year. It was about five months ago." When the court said, "So you don't remember telling the police that?" the mother's response did not

answer the question; she replied: "Well, really is that the police asked me if the child complained that she was burning when she used the bathroom. That she burned when she used the bathroom. And the child doesn't tell me – let me know every time she goes to the bathroom.")

- Mother testified that E. had a history of rashes (but then stated there were only two, the first one about four or five months earlier). And she told the police that she and S.C.G. inspected E.'s vaginal area on a regular basis.
- Mother told the police that E. told the mother that E.M. had touched her vagina and caused it to be red/irritated, and mother advised E.M it was not right to touch E. in the vaginal area.
- Mother testified that E.'s false allegation that E.M. touched her vagina – variously said by mother and E.M. to have been six months, about a year, or two years previously – occurred before S.C.G. lived with them, but she initially told the police she had been living with S.C.G. for four years. At trial, she said S.C.G. had been there "more or less two-and-a-half years . . . ."
- In addition, E. told police that S.C.G. enters her bedroom when she is asleep and touches her vagina, and E.M. told police that he often saw E. scratching her vaginal area, and that S.C.G. tucked him and E. into bed every night, and looked at E.'s vaginal area.

The confluence of this evidence permits a reasonable inference that the mother should have known that something was amiss, and would have discovered the abuse had she investigated.

The mother insists that "no evidence" supports the juvenile court's finding that she should have known of the ongoing sexual abuse. She dismisses the redness and rashes as insufficient and "not unusual in a child of [E.'s] age," and dismisses E.'s complaint that E.M. had touched her as "no reason for Mother to infer that [E.] was being sexually abused by her step-father . . . ." But we do not assess each point in the abstract. It is the

combination of facts – a year during which E. told her mother of discomfort in her vagina, together with her allegation of inappropriate touching by E.M. – which should have led her to suspect abuse was occurring. (And her testimony that the length of time during which E. complained of discomfort was only five or six months (compared with a year in her earlier statement to the police) further suggests an awareness that she should have realized abuse was occurring.)

In sum, viewing the evidence in the light most favorable to the judgment, as we must, we necessarily affirm the juvenile court's order.[7]

B. The children's appeal.

E. and B. (but not E.M.) also appeal the court's order. They, too, say that the "sole issue in this case is whether the mother reasonably should have known that [S.C.G.] was sexually molesting four year old [E.]." Their argument, however, is that, because there was insufficient evidence to support the court's finding that the mother failed to protect the children, there was not enough evidence of risk to the children to sustain dependency jurisdiction, so that the jurisdictional findings and dispositional order should be reversed and the Department's petition dismissed in its entirety. We have already rejected the premise underlying their arguments: there *was* substantial evidence that the mother should have known of the abuse. We briefly address the arguments E. and B. raise, to the extent they differ from those of the mother.

First, E. and B. assert the juvenile court "applied the wrong legal standard," and that the correct standard by which to assess whether mother should have known of the sexual abuse "is that of a reasonably aware and prudent parent." This argument avails E. and B. nothing. We do not quarrel with their articulation of the meaning of "should have

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[7] The mother also argues that, even if we find substantial evidence to support a finding mother should have known E. was being sexually abused, there is no evidence to support a finding that mother failed to take action to protect the children. Mother points out that, when police told her of the abuse, she then took action to protect the children. But the point is that no action was taken to protect the children during the time she *should* have known of the abuse.

known"; certainly the question whether a parent "should have known" of sexual abuse is assessed using a reasonableness standard. But we fail to see any indication that the juvenile court did not use a reasonableness standard, and the only question is whether substantial evidence supported its conclusion. We have concluded that it did.

Second, E. and B. argue that jurisdictional findings must be based on evidence before the court and the circumstances of the children at the time of the hearing, citing *In re Rocco M.* (1991) 1 Cal.App.4th 814, 824 [while evidence of past conduct may be probative of current conditions, "the question under section 300 is whether the circumstances *at the time of the hearing* subject the minor to the defined risk of harm"]. E. and B. argue that, at the time of the hearing, the mother had not resumed her relationship with S.C.G. and was adamant she would not do so; as a consequence, there was no risk that mother would permit contact or fail to protect her children in the future. Therefore, the allegations of the petition should have been dismissed. We cannot agree. When asked at the hearing if it was her intention to become involved in a relationship with S.C.G., the mother replied, "Not at this time." The Department's report showed the social worker's assessment that the mother "at times appears to believe [S.C.G.'s] version of the story," and that mother should be ordered to have sexual abuse awareness counseling. In addition, mother and S.C.G. owned a sewing business together, and thus would necessarily continue to have some kind of contract with each other. Under these circumstances, the evidence of risk to the children, at the time of the hearing, was sufficient to sustain jurisdiction.

Finally, E. and B. contend that, even if the jurisdictional allegations were properly sustained, "there was insufficient evidence that dependency was necessary to protect them from the risk of suffering serious physical harm . . . ." They argue the court should not have adjudicated the children as dependents, and instead should have ordered that services be provided, and the children and parents placed under county supervision, under section 360, subdivision (b), which provides:

> "If the court finds that the child is a person described by Section 300, it may, without adjudicating the child a dependent child of the court, order that services be provided to keep the family together and place the child and the child's parent or guardian under the supervision of the social worker for a time period consistent with Section 301."

While the court may have had the discretion to act under section 360, E. and B. cite no authority requiring it to do so. Nor did E. and B. ask the court to do so at the hearing. Indeed, E. and B.'s counsel expressly asked that "the counts in regards to sexual abuse be sustained as pled." Moreover, we do not think any court, confronted with evidence of sexual abuse as in this case, would have opted to "order that services be provided to keep the family together" (§ 360, subd. (b)) rather than declaring the children dependents of the court. Because substantial evidence supported the juvenile court's order, it must be affirmed.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

O'NEILL, J.*

We concur:

RUBIN, Acting P .J. BIGELOW, J.

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* Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.